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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of

Amendment of Part 90 of the  
Commission's Rules To Facilitate  
Future Development of SMR Systems  
in the 800 MHz Frequency Band

and

Implementation of Section 309(j)  
of the Communications Act-  
Competitive Bidding  
800 MHz SMR

)  
)  
) PR Docket No. 93-144  
) RM-8117, RM-8030  
) RM-8029  
)  
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)  
) PP Docket No. 93-253  
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To: The Commission

**Comments of The Ericsson Corporation**

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January 5, 1995

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## **Summary**

Market-defined licensing schemes are not inherently contrary to the public interest. Indeed, many benefits can be realized by service providers and consumers alike from systems which are licensed to operate on market-defined basis. The proposal to award MTA-based licenses for the 800 MHz SMR band is, however, contrary to the public interest due to the inequity which will be visited upon existing licensees who already operate in this band.

The Commission's proposal amounts to a boon to large companies with deep pockets at the expense of traditional local SMR licensees. Large corporations with substantial funds at their disposal will be the only entities able to bid on and build MTA-wide systems. It is no answer to suggest that local licensees will be permanently grandfathered and protected by MTA licensees since there is no opportunity for local licensees to expand operations to accommodate new demand. Neither is it a satisfactory answer to suggest that local licensees can relocate to the lower 80 800 SMR MHz channels since that spectrum is already heavily occupied. As a practical matter the FCC's proposal offers no suitable alternatives to enable local licensees in the upper portion of the 800 MHz SMR band to continue to operate viable systems.

The hardship that will be visited upon thousands of small businesses by adoption of this proposal must be compared to the need for MTA-wide licenses in the 800 MHz SMR band in the first instance. At this point in time, there has been no demonstration that a 10 MHz MTA-based SMR system can compete with entrenched 25 MHz cellular licensees,

the three soon-to-be licensed 30 MHz broadband PCS licensees or the three soon-to-be-licensed 10 MHz broadband PCS licensees.

If the Commission were dealing with virgin 800 MHz spectrum, one might argue that the marketplace should determine which broadband service providers will ultimately succeed. Here, however, the Commission is artificially manipulating an existing market. In this situation the Commission must recognize the rights of thousands of incumbent SMR licensees who will be adversely affected by adoption of the instant proposal. At best, traditional SMR licensees will be prevented from expanding their operations. At worst, the Commission's proposal may sound the death knell for small 800 MHz SMR operators.

The Commission's proposal to license the lower 80 800 MHz SMR channels on a BTA basis is no more equitable than its proposal to license the upper 200 channels on an MTA basis. Existing lower channel service providers (or relocated upper channel service providers) may not want to provide BTA-based service, may not be able to afford to bid on a BTA service area or may not have the financial ability to construct a BTA service area. These entities will be placed in jeopardy by new entrants who view auctions as a means of entering a market not otherwise available to them. Here too, the FCC must evaluate its proposal by comparing the benefit to be derived against the adverse impact to the thousands of established licensees. The benefits of licensing the lower 80 800 MHz SMR channels on a BTA basis do not outweigh the equities in favor of small entrepreneurs who have invested in facilities based on long standing rules. The Commission should not adopt market-defined service areas for 800 MHz licensees. To

the extent the Commission chooses to do so, however, it should permanently grandfather existing upper channel licensees and adopt rules which do not allow MTA licensees to use the lower 80 800 MHz SMR channels for any purpose. Furthermore, the Commission should not allocate lower channel licenses on the basis of market-defined service areas using competitive bidding procedures.

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Competitive Bidding	)	
800 MHz SMR	)	
	)	

To: The Commission

**Comments of The Ericsson Corporation**

The Ericsson Corporation, on behalf of itself and affiliated companies (hereinafter collectively referred to as "Ericsson"), hereby submits its comments in response to the *Further Notice of Proposed Rule Making*<sup>1</sup> in the above-captioned proceeding. In support thereof, Ericsson states as follows:

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<sup>1</sup> *Amendment of Part 90 of the Commission's rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act-Competitive Bidding 800 MHz SMR*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, PP Docket No. 93-253, FCC 94-271, \_\_\_ Rcd \_\_\_ (Released November 4, 1994) (hereinafter FNPRM").

## **I. The 800 MHz Wide-Area MTA Licensing Proposal Does Not Serve The Public Interest**

### **A. There Has Been No Demonstration That 800 MHz SMR MTA Licensing Is Necessary**

Ericsson opposes the Commission's proposal to create a new regulatory framework for licensing 800 MHz SMR systems in the upper 200 channels<sup>2</sup> of the 800 MHz SMR band. Ericsson does not believe allocation of licenses on an MTA basis for 800 MHz SMR systems<sup>3</sup> is in the public interest for a number of reasons.

First, there has been absolutely no demonstration that MTA-based 800 MHz SMR systems are necessary. The Commission has already amended its rules to allow SMR licensees who wish to provide wide-area service to do so.<sup>4</sup> To the extent wide-area service is deemed necessary and desirable, a regulatory structure is already in place to offer such service.

Second, despite the fact the Commission believes additional competition in the provision of broadband CMRS services is beneficial, there has still been no demonstration that MTA-based SMR services will be competitive with cellular and/or new PCS services. Despite much hoopla about certain SMR or ESMR carriers being fully competitive with cellular service providers, trade press and other reports call into question the ability of SMR service providers to compete with cellular (and presumably PCS) carriers:

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<sup>2</sup> Channels 401-600 in the 800 MHz SMR band.

<sup>3</sup> Ericsson distinguishes "wide-area" SMR systems licensed on a transmitter by transmitter basis (i.e., systems consisting of more than a single transmitter) from systems licensed on an "MTA" or "BTA" basis which are substantially wider in geographic scope. Ericsson submits that wide-area systems are in the public interest. However, no demonstration has been made that 800 MHz SMR systems need to be licensed for geographic areas as large as MTAs or even BTAs.

<sup>4</sup> See, Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1522, *recon dismissed*, 6 FCC Rcd 6989 (1991).

With three leading enhanced specialized mobile radio (ESMR) service providers recently suffering 52-week lows in their stock prices, a new tide of apprehension appears to be rising for ESMRs. Perhaps one manifestation of this is that Motorola Inc. officials last week stressed the need to adjust their marketing strategy for ESMR technology.

The greatest marketing change would attempt to alter the perception that ESMRs soon would be a third cellular competitor, focusing instead on integrated wireless services for dispatch, said Lise Farmer, spokeswoman for the Motorola division supplying Motorola Integrated Radio System (MIRS) technology to Nextel Communications, Inc. and its potential partners OneComm Corp. and Dial Page Inc. (Emphasis in the original.)

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*Robert Pons*, an analyst with New York-based Telecom Marketing, proposes that Nextel's bold approach in taking on cellular attracted a lot of attention to the Rutherford, N.J.-based ESMR provider while raising investors' expectations for a performance level MIRS could not meet. "They first started talking about being a third cellular carrier...but they didn't have a technology that was superior to cellular. [Without superior technology] and if they can't price it well below cellular, then how are they going to [compete with cellular]."<sup>5</sup>

To the extent MTA-based 800 MHz SMR licensees are not going to provide services competitive with the two existing cellular carriers and the six soon-to-be licensed broadband PCS carriers, there is no reason to allocate a significant amount of contiguous 800 MHz spectrum for this purpose. Before moving headlong into a new regulatory scheme which will have an adverse impact on thousands of existing local SMR licensees, the Commission should conduct an inquiry to ascertain whether 800 MHz MTA-based SMR service is actually necessary.

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<sup>5</sup> *Land Mobile Radio News*, Volume 48, No. 47, p. 1., December 2, 1994.

### **B. 800 MHz SMR Licensing Is Unfair to Existing SMR Licensees**

The Commission's proposal will have a significant adverse impact on the thousands of local SMRs<sup>6</sup> who have been licensed in reliance on existing rules and procedures despite the fact that the Commission has wisely proposed to permanently grandfather all SMR licensees in the upper band. Under the Commission's proposal there will be no opportunity for the thousands of existing local SMR licensees to expand their systems unless the consent of the MTA licensee is obtained. Consent of the MTA licensee is not likely to be given since it has every incentive to "clear" grandfathered spectrum to expand its own MTA operations as quickly as possible.

Because the local licensee will not be able to expand, its system will be less attractive to existing and potential customers. The ability of local SMR licensees to sustain a viable 800 MHz SMR service will continue to diminish until the local SMR licensee is forced to relocate to the lower 80 SMR channels or ceases operations altogether.

### **C. Use of Auctions to Award 800 MHz SMR Licenses Is Inequitable**

The Commission's proposal to use auctions to award MTA-based 800 MHz SMR licenses artificially skews the already competitive 800 MHz SMR market in favor of large companies to the detriment of existing local 800 MHz SMR licensees.

In the FNPRM the Commission acknowledged that the 800 MHz SMR industry is characterized by thousands of small entrepreneurs who provide localized dispatch services

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<sup>6</sup> The term "local licensee" as used in this document refers to existing licensees in the 800 MHz SMR band who are not licensed, or do not wish to be licensed, on an MTA or BTA-wide basis.



to customers.<sup>7</sup> As a general matter such licensees are typically small business entities who will not be able to afford to participate in auctions for licenses whose geographic area is as extensive as an MTA. Moreover, small companies already providing 800 MHz local SMR service may not want to expand operations to the extent required to provide MTA-wide coverage. The use of auctions to award 800 MHz licenses is, therefore, likely to draw only a handful of serious bidders who have the “deep pockets” and financial ability to bid on, and construct, extremely large, multi-transmitter 800 MHz SMR systems. The use of auctions in the 800 MHz SMR context will effectively preclude small businesses from participating in the provision of SMR service in the upper channel block. This is particularly egregious for existing local 800 MHz SMR licensees since, as described above, these small independent entrepreneurs will not be able to expand existing operations and their systems will become commercially questionable. Moreover, as will be described in greater detail below, moving to the 80 “lower” 800 MHz SMR channels is not a viable alternative.

Though the Commission clearly has authority from Congress to award “initial licenses” by using competitive bidding procedures, the Omnibus Budget Reconciliation Act of 1993 did not give the Commission the express authority to use auctions to effectively displace thousands of existing service providers when no suitable alternative spectrum is available.<sup>8</sup> Thus, the Commission appears to exceed its statutory authority to

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<sup>7</sup> FNPRM, paras. 3-4.

<sup>8</sup> In the broadband PCS context the Commission ruled that existing microwave licensees in the 2 GHz Emerging Technologies band would be required to relocate to different spectrum. That situation is distinguishable from the case at hand since “incumbent” microwave licensees in the Emerging Technologies band have an ample amount of alternative spectrum which is suitable for the purposes intended. Also, unlike the 800 MHz SMR proposal, incumbent microwave licensees have other options available including, but not limited to, use of fiber optic cable and/or landline facilities.

award licenses for MTA-wide 800 MHz SMR systems based on competitive bidding techniques.

In view of the fact that thousands of existing local 800 MHz SMR licensees are at risk because of the Commission's proposal, Ericsson submits the Commission should refrain from using auctions to award MTA-based 800 MHz SMR licenses at least until it has conducted the 900 MHz SMR auctions. After evaluating the impact of auctioning MTA licenses for the less crowded 900 MHz SMR band the Commission will be in a better position to evaluate the effect an auction will have on local licensees in the 800 MHz SMR band.

## **II. Existing 800 MHz SMR Licensees Should Be Permanently Grandfathered And Mandatory Relocation To The Lower 80 SMR Channels Should Not Be Required**

Ericsson supports the Commission's proposal to permanently grandfather existing 800 MHz SMR licensees in the upper 200 channels. Similarly, it opposes the mandatory relocation of upper channel 800 MHz SMR licensees into the lower 80 channels. Existing local 800 MHz SMR licensees in the upper channel block have relied on existing rules to construct and operate their 800 MHz SMR systems. From a pure equity standpoint it would be unconscionable to require thousands of licensees to relocate to other channels within the 800 MHz SMR band.<sup>9</sup> Even if equity were not a factor, mandatory relocation rules should not be adopted since there is insufficient 800 MHz spectrum in which relocation can take place. There are thousands of local 800 MHz SMR

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<sup>9</sup> It is the sheer number of grandfathered licensees in operation in the upper portion of the 800 MHz band and the fact that there is no suitable spectrum available for relocation which distinguishes the instant proposal from broadband PCS and other potential market-defined licensing scenarios such as may exist in the 931 MHz band.

licensees in the upper 200 channels. Because there is virtually no 800 MHz SMR spectrum available in most areas of the country, mandatory relocation for all upper channel licensees can not mathematically or technically be accommodated in the lower 80 channels. Mandatory relocation under these circumstances is tantamount to providing “relocated” upper channel licensees with spectrum of less value.

Ericsson notes that the Commission asks for comment on whether it should involve itself in a “voluntary relocation negotiation” between an MTA-based licensee and a local licensee in the event the local licensee refuses a “reasonable inducement” to relocate to the lower 80 channels. Ericsson submits the Commission should not enter into “voluntary negotiations” under any circumstances inasmuch as such an intrusion into the negotiation process is virtually the same as requiring mandatory relocation. Even if the Commission is able to participate in relocation negotiations only under specified conditions, the dynamics of the negotiation process will be dramatically changed. The local licensee, who is generally going to be a small entity with less sophistication than the MTA-licensee, is likely to believe it will ultimately be required to relocate to spectrum which is not comparable to that already being used. The local licensee is also not likely to have the resources to engage in good faith negotiations for relocation, especially if it is forced to participate in proceedings in which the MTA-wide licensee and Commission participate. Lastly, the MTA-based licensee has incentive to refuse to negotiate in good faith since it knows the Commission will ultimately force the local licensee to accept “reasonable inducements” in return for relocation.

### **III. The Lower 80 800 MHz SMR Channels Should Continue To Be Available Only For Local Licensing**

The Commission proposes to allow MTA-based licensees to maintain eligibility for licensing on the 80 lower 800 MHz channels, albeit by licensing only 5 channels at a time. Ericsson opposes this proposal for a number of reasons.

First, as mentioned above, there has been no factual demonstration in any proceeding to date which shows that MTA-based 800 MHz SMR systems are necessary to provide further competition in the two-way broadband CMRS market. There are already two cellular licensees per market and there will soon be an additional six broadband PCS licensees in each market who are capable of providing two-way broadband services.

Second, as described above, if the Commission licenses 800 MHz SMR systems on an MTA basis, many 800 MHz SMR local licensees will find it extremely difficult to continue to conduct business on these channels due to the fact that they will not be able to expand their systems. Award of MTA-based licenses may, in fact, create a de facto mandatory relocation requirement. To the extent relocation becomes a necessity, it is critically important that the lower 80 800 MHz SMR channels are reserved as a “safe haven” for any local licensees who currently operate in the upper channels.

Third, the Commission will exacerbate the crowding problem for local licensees who want to relocate since making the lower channels available for MTA licensees will merely decrease the number of lower channels available for local SMR use. The Commission must be aware that thousands of local licensees operate on the upper 200 channels as well as the lower 80 channels. Many of these small businesses want to continue to provide local service and are not interested in providing MTA-based service.

Many of these small businesses will not be able to compete against bidders for MTA licenses due to insufficient finances being available. Thus, to the extent the Commission moves forward with its proposal to license upper channel spectrum on an MTA-wide basis, it is critical that as much spectrum as possible be made available for licensees who wish to provide only localized service. Allowing MTA licensees to obtain licenses for the lower channel blocks will only exacerbate a serious problem created by the MTA licensing scheme.

#### **IV. The FCC Should Not License Lower SMR Channels On A BTA Basis And Auctions Should Not Be The Means For Allocating Such Licenses**

In the FNPRM the Commission calls for comment on whether it should award lower channel licenses on the basis of a market-defined area. The specific market area proposed is the BTA. Ericsson submits there is no reason for the Commission to adopt such rules.

As expressed above, the 800 MHz SMR licensing scheme was adopted almost 20 years ago to enable licensees to provide localized commercial dispatch services. Thousands of SMR licenses have been awarded to small business entities who are providing such services. Many of these small businesses have no desire to provide service in an area as large as a BTA. The cost of constructing an 800 MHz BTA system for a small business would require a financial investment in facilities which may be beyond the means of numerous licensees. Similarly, the use of auctions to award BTA licenses would place purely local licensees at a significant disadvantage relative to larger companies who have the resources to bid on spectrum at an auction.

Small businesses have invested substantial funds in their systems and have relied for years on a regulatory scheme based on transmitter-defined service areas. It is inequitable to require such operators to increase their coverage areas, bid for spectrum they already use (at least in certain portions of any market-defined service area) or face almost insurmountable competition from larger, better financed corporations.

## **V. Conclusion**

Market-defined licensing schemes are not inherently contrary to the public interest. Indeed, many benefits can be realized by service providers and consumers alike from systems which are licensed to operate on market-defined basis. What makes the FCC's MTA-based licensing proposal in this proceeding contrary to the public interest is the inequity which will be visited upon existing licensees who already operate in this band.

The Commission's proposal amounts to a boon to large companies with deep pockets at the expense of the traditional local SMR licensee. Large corporations with substantial funds at their disposal will be the only entities able to bid on and build MTA-sized systems.<sup>10</sup> It is no answer to suggest that local licensees will be permanently grandfathered and protected by MTA licensees since there is no opportunity for local licensees to expand operations to accommodate new demand. Neither is it a satisfactory answer to suggest that local licensees can relocate to the lower 80 800 SMR MHz channels since that spectrum is already heavily occupied. As a practical matter the FCC's

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<sup>10</sup> Narrowband auctions conducted to date have demonstrated that bidding credits, installment payments and other mechanisms designed to allow economically less fortunate entities to be able to participate in auctions, have not kept the price of spectrum down to reasonable levels. Though certain DE groups have been able to participate and have won narrowband licenses, the cost of acquisition has been every bit as high and higher in some cases than the amount paid for comparable spectrum by non-DE applicants.

proposal offers no suitable alternatives to enable local licensees in the upper portion of the 800 MHz SMR band to continue to operate viable systems.

The hardship that will be visited upon thousands of small businesses by adoption of this proposal must be compared to the need for MTA-wide licenses in the 800 MHz SMR band in the first instance. At this point in time, there has been no demonstration that a 10 MHz SMR system can compete with entrenched 25 MHz cellular licensees, the three soon-to-be licensed 30 MHz broadband PCS licensees or the three soon-to-be-licensed 10 MHz broadband PCS licensees. Moreover, there is already a question as to whether so-called ESMR system licensees are capable of competing with other broadband PCS operators.

If the Commission were dealing with virgin 800 MHz spectrum, one might argue that the marketplace should determine which broadband service providers will ultimately succeed. Here, however, the Commission is artificially manipulating an existing market. In this situation the Commission must recognize the rights of thousands of incumbent SMR licensees who will be adversely affected by adoption of the instant proposal. At best, traditional SMR licensees will be prevented from expanding their operations. At worst, the Commission's proposal may sound the death knell for small operators.

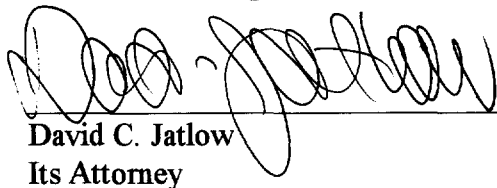
The Commission's proposal to license the lower 80 channels on a BTA basis is no more equitable than its proposal to license the upper 200 channels on an MTA basis. Existing lower channel service providers (or relocated upper channel service providers) may not want to provide BTA-based service, may not be able to afford to bid on a BTA service area or may not have the financial ability to construct a BTA service area. These

entities will be placed in jeopardy by new entrants who view auctions as a means of entering a market not otherwise available to them. Once again the FCC must view its proposed regulatory actions by comparing the benefit to be derived against the adverse impact on thousands of established licensees. Ericsson submits the benefits of licensing the lower 80 800 MHz SMR channels on a BTA basis does not outweigh the equities in favor of small entrepreneurs who have invested in facilities based on long standing rules.

In view of the foregoing, Ericsson submits the Commission should not adopt market-defined service areas for 800 MHz licensees. To the extent the Commission chooses to do so, however, it should permanently grandfather existing upper channel licensees and adopt rules which do not allow MTA licensees to use the lower 80 channels for any purpose. Furthermore, the Commission should not allocate lower channel licenses on the basis of market-defined service areas using auctions as the licensing procedure.

Respectfully submitted,

The Ericsson Corporation

  
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